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In the Supreme Court of the United States

OCTOBER TERM, 1957

JAMES W. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 6) is reported at 246 F. 2d 486.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1957, and a petition for rehearing was denied on October 1, 1957. The petition for a writ of certiorari was filed on October 28, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, who had directed the tellers in his bank on several different occasions to redeem certain stolen government bonds, thereafter violated 18 U. S. C. 1001 by making false statements to the Treasury Department as to the manner of such redemption in an effort to resist a claim for reimbursement.

2. Whether, in the circumstances of this case, where statements by two witnesses were turned over to defense counsel and one was examined by the court alone, the conviction should be reversed under the rule of *Jencks* v. *United States,* 353 U. S. 657.

3. Whether the trial court erred in allowing petitioner to be cross-examined as to his conduct of the banking business, where petitioner had gone into the matter extensively on direct examination.

STATUTE INVOLVED

18 U. S. C., Section 1001, provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted in the District Court for the Southern District of New York on a three count indictment charging the making of false statements to the Treasury Department as to the cashing of certain United States Savings Bonds (R. 3–4).[1] He was sentenced to imprisonment for five years on each count, the sentences to run concurrently (R. 5). On appeal, the conviction was affirmed (Pet. App. 4).

The bonds involved in the case were fifty-nine United States Savings Bonds, of an aggregate value of $6,684.50, registered in the names of members of the Chernoff family, including three children under ten. They had been stolen from Mr. Chernoff's business premises in May 1946 (R. 10, 290; App. 21–22). They were cashed by the Pennsylvania Exchange Bank of which petitioner was president. The government's evidence was directed to proving that the bonds had, to petitioner's knowledge, been cashed by one Irving Mishel in violation of Treasury regulations with respect to identification (see App. 14–18) and hence that petitioner's letters to the Treasury Department, resisting a claim for reimbursement on the assertion that the bonds had been cashed by a person sufficiently identified as Chernoff, were knowingly false.

1. Irving Mishel was a witness for the government. He had a long criminal record and was currently in confinement (R. 19, 20). He said that in 1946 or

[1] Petitioner's appendix in the court below is designated as "R."; the government's appendix as "App."

1947 he was introduced to petitioner, the president of the Pennsylvania Exchange Bank, and Mr. William Gallagher (now deceased), Chairman of the Board (R. 22). Mishel opened up some "stiff accounts" (*i. e.*, accounts in fictitious names which were used in cashing checks for bookmakers and black marketers) with the full knowledge of petitioner. It was understood that Mishel and his associates were to pay $150 a month for each account, and close an account whenever petitioner directed (R. 23–26). Mishel made payment by sending money in an envelope to petitioner by various messengers, including Sam Siegel and Norton Schnabel (R. 26).[2]

In opening the "stiff accounts" Mishel took signature cards to petitioner with some checks he wanted to deposit and petitioner told him he would have to have some addresses on them. Mishel gave him the address of his cigar store for one and a place used to book horses for another (R. 27). The signature cards show "Introduced by JWM" (App. 3, 4; R. 28).[3]

Mishel met one Frank Pace and Irving Mickey Rosenberg about September 1949, the purpose being

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[2] Sam Siegel, who was on probation from a conviction for forgery, testified that, as an errand boy for Mishel from 1948 to 1950, he had brought sealed envelopes with money to petitioner three or four times (R. 430). Norton Schnabel, manager of the "Club Baby Grand," said he had worked for Mishel from about December 1949 to about March 1951, in various capacities and had delivered envelopes to petitioner about fifteen times, but did not feel he could say what was in them (R. 458–461).

[3] Sidney Hack, testifying for the government, said that he had signed the two signature cards at the request of Mishel and also signed checks in connection with these two accounts, but had never made any personal use of the accounts (R. 250–251).

to negotiate some stolen "E" bonds registered in the names of the Chernoff family (R. 20). About December of that year he took the bonds to Miller and asked to have them cashed (R. 29, 30). Petitioner told him he could, but he would have to have somebody sign them (R. 29). Mishel called Mickey Rosenberg, who came to his office the next morning and signed the bonds and some redemption slips which Miller had given him, in the name of Nat Chernoff (R. 31). Mishel took them to the office of petitioner who said they were not signed on the right line (R. 31). Mishel had Rosenberg, who was known to petitioner, come to the office and petitioner told him how to sign (R. 32).

When Mishel returned to get his money, petitioner gave him $840 on one bond, telling him that they could not all be cashed at once. It was agreed that petitioner was to receive ten percent and Mishel paid him $100 at that time (R. 34, 43–44). The bonds were cashed at eight different times between December 29, 1949, and February 20, 1950 (R. 34–36; App. 21–22). Mishel identified the bonds and the redemption forms (R. 39, 40; Govt. Exhs. 1-A through 8-A, App. 6–13). On three redemption forms (Exhibits 5A, 6A and 8A), the identification is printed "Thomas Young," the name of one of the "stiff accounts." This was done by Mickey Rosenberg at the suggestion of petitioner (R. 53–54). On Exhibit 8A the signature of David Chernoff was made either by Mishel or by Sam Siegel (R. 54).

Mishel would be in the bank and sit around while bonds were being cashed (R. 34). He gave money to petitioner either at the bank or at the Holland House

across the street (R. 34). One day petitioner had the bank guard take some of the bonds to Mr. Horan, one of the tellers, to have them cashed. Horan had them sent back because there was no identification with them. Petitioner had the guard take them back to Horan and tell him that he had said to cash them. Horan returned them again and petitioner said, "You tell Frank Horan that I said either he cash those bonds or go in the back and get his hat and coat and go home. I am still the boss here." This time the bonds were cashed (R. 37-39). This incident was corroborated by Francis Horan, Jr., a teller, who testified he refused to cash bonds in the name of Chernoff until the guard told him that petitioner had said, with some strong language, that Horan should mind his own business and do as he was told (R. 341). Horan said he put the redemption ticket with petitioner's initials in the desk and went to lunch and when he came back it was gone; that Government Exhibit 3A, which purports to cover this transaction, was not the original (R. 342).

Miss Graef was regularly the one who had charge of redeeming government bonds, but others filled in when she was away from her window (R. 340, 360). She and Horan (both of whom had left the bank at the time of trial), and James J. Lucey, Jr. (still employed by the bank at the time of trial), all testified that when a person unknown at the bank wished to cash bonds, the customary procedure was to send such a person to one of the officers of the bank, who would either initial the bonds or the redemption forms (R. 255, 339, 359–360). They testified that there was an un-

obstructed view from Miss Graef's window to Mr. Miller's desk (R. 255–256, 340, 360), a fact corroborated by an F. B. I. exhibits specialist (R. 11–18).

Virginia Graef testified that she cashed the Chernoff bonds five times (R. 256). The first time the guard brought some over for cashing she asked him where they came from and why they were not initialed (R. 256). He said that petitioner said to cash them. She looked over at Mr. Miller's desk and saw only Irving Mishel seated there talking with him. She cashed the bonds and the guard took the money back. Still no one was there but Mr. Mishel (R. 257). Nat Chernoff was never introduced (R. 259). She wrote "Miller" on one of the redemption slips (Govt. Exh. 2A), because he was the officer who had authorized the transaction (R. 259–260).

James J. Lucey, Jr., said that he filled in for Miss Graef on two occasions. The guard brought over some bonds in the name of Chernoff and said the boss had said to cash them, that it had been done before. Lucey looked in the bond register, saw that this was true and cashed the bonds, making a notation of petitioner's initials on the redemption slip. The next time he did the same. No one was at petitioner's desk but Mr. Mishel (R. 361–362). No one was introduced to him as David Chernoff, or Blanche Chernoff, nor anybody presented as Thomas Young, who appeared as the identification (R. 363).

2. In July 1950, the Treasury Department notified petitioner of the loss or theft of the Chernoff bonds, and requested that the bank assemble all known in-

formation for presentation to the Secret Service agent when he came (App. 19). Petitioner testified that he turned this over to the head teller, Mr. Wilmot, and told him to check into it. The latter reported back that he could not get any information from anybody in the bank or the records which would indicate how they were cashed (R. 616). The two tellers who were no longer with the bank, Miss Graef and Mr. Horan, testified that neither the bank officials nor their attorneys ever asked them for information as to the cashing of the bonds (R. 265, 343).

In August 1950, when two Secret Service agents questioned petitioner about the bonds, he said he knew nothing about the circumstances, that the tellers cashed the bonds (R. 465). In October, petitioner said he had been doing some thinking and Mishel had come in on two occasions. An individual was with him, who remained some distance away and who Mishel said was a friend named Chernoff. Mishel asked petitioner to cash some bonds for Chernoff, which petitioner did (R. 467). The agent asked petitioner how he came to accept the name of Thomas Young as identification and petitioner replied that he did not recall the exact transaction (R. 467). Petitioner said he had not talked with this other individual named Chernoff. The agent told petitioner it was obvious that he had not followed the Treasury Department regulations (R. 468).

On November 16, 1951, the Treasury wrote a letter to petitioner stating that investigation showed "(2) payment of the bonds was made to one Irving Mishel,

who was well known to you." The letter noted this was in violation of regulations and requested reimbursement in the amount of the bonds (App. 23–24). Petitioner replied on December 26, 1951 (App. 25), saying (par. 2):

> At the time the investigation was made by your Department we were informed that the bonds were properly cashed in accordance with procedure laid down in your official circular and consequently no claim would be made against us. We note the several matters listed in the second paragraph of your letter as being disclosed by your investigation, but call your attention to the fact that item (2) is incorrect according to the information that we have and which was given to and confirmed by your investigators.

The letter closed by saying that the bank should be relieved from liability (App. 26). This letter was the basis for Count One of the indictment.

The Treasury answered Miller's letter on February 5, 1952, stating that a careful review had been made of the case and full consideration given to petitioner's comments; that the statute permits the Treasury to give relief only when the loss occurred without fault or negligence of the paying agent; that investigation showed that the bonds were paid by the tellers at petitioner's instructions; that the proceeds were delivered to petitioner and in at least two instances he personally had handed the money to Mishel. The letter further stated that petitioner had told the investigating officer that the individual brought in as the purported owner remained at a distance and petitioner

did not meet him or attempt to identify him as the registered owner, nor was there any attempt to identify any one as the registered owner or co-owner. Therefore, reimbursement should be made as previously requested (App. 26–27).

Petitioner answered on April 4, 1952, with his second letter (App. 29), the basis of Count Two, in which he said (par. 2):

> We regret that you are insisting on reimbursement because we feel that these bonds were cashed in good faith and within the meaning, letter and spirit of Paragraph 4 of the Treasury Department's Circular covering such redemptions dated December 19, 1947.[1] When you originally called this matter to our attention we notified our bonding company, but subsequently informed them that the investigation made by your Department indicated that the bonds were properly cashed in accordance with the procedure laid down in your official circular as advised in our letter to you dated December 26, 1951.

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[1] Paragraph 4 of this Circular says that personal identification is not considered adequate when a paying agent accepts the bare statement of the identifier that he knows the person presenting the bond for payment. The paying agent should inquire as to the source and duration of the identifier's acquaintance and be satisfied therewith. The agent should also require the identifier to sign his name and address on the bonds or on a separate record, or the agent should make such record. The agent may imprint on the back of the bond a guarantee for the signature of the identifier, for its own protection. In case of loss the identifier will be expected to show a reasonable basis for his identification. In the absence of such basis, the agent will be considered to be at fault and will have to sustain the loss unless reimbursement can be obtained from the indentifier. (App. 17–18).

On May 13, 1952, petitioner sent a memorandum to Mr. I. Alfred Levy, of the law firm of Dorff and Levy, turning over the Chernoff file and requesting that he take the matter up with the Treasury Department "in an endeavor to make an adjustment" (App. 30–31). On May 21 petitioner received another request for reimbursement from the Treasury (App. 32) and forwarded it to Mr. Levy so that he could take it up with the Treasury "in an endeavor to make a settlement as suggested by us previously" (App. 31–32).

The draft of the letter prepared by Dorff and Levy (App. 34) was corrected by petitioner and sent back to them (App. 36–39). The letter in its final form, dated June 4, 1952 (App. 40–41), made the following statement of facts as to the cashing of the Chernoff bonds:

> We have been advised that a person came into the bank with a depositor of the bank, one Irving Mishel. This person signed the bonds in the presence of a teller of the bank and asked the teller to redeem the bonds. The teller asked for identification and Mr. Mishel, who was with that person, told the teller that Mr. Miller knew Mishel and that he was identifying the person as the payee named in the bonds. Mr. Mishel and the person with the bonds went over to Mr. Miller and the latter asked Mr. Mishel who the person was; Mr. Mishel introduced that person to Mr. Miller as Mr. Chernoff, the man in whose name the bonds were registered.

This was the basis for Count Three of the indictment.

ARGUMENT

1. *Sufficiency of the evidence.* In this Court petitioner is raising for the first time[3] an issue as to the sufficiency of the evidence to support his conviction. He contends (Pet. 30-32) that the statements in his letters to the Treasury Department were not of a material fact and were not fraudulent. He does not seriously argue that false statements were not made. There was ample evidence before the jury to show that statements in the letters were false. Thus the first letter not only contained the statement referred to by petitioner ("we were informed that the bonds were properly cashed") but also denied the government's assertion that petitioner had made payment to Mishel. The assertion in the second letter ("we feel that these bonds were cashed in good faith") was not a mere expression of opinion as suggested by petitioner. In the light of the evidence that petitioner knowingly cashed stolen government bonds in exchange for a portion of the proceeds, the jury was certainly justified in finding the second letter contained a fraudulent representation. The third letter[4] set forth an account of the circumstances of the cashing

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[3] This was not a ground urged in support of the motion for judgment of acquittal (R. 480–484) nor on appeal (Pet. App. 6–14).

[4] The fact that the third letter was signed by petitioner's counsel cannot excuse petitioner of responsibility for the false account which he gave his attorney and had the attorney send to the Government. The statutory language is broad enough to cover such circumstances, and petitioner does not appear to argue otherwise. (Pet. 17.)

which the jury could have found was wholly at variance with the truth (see the Statement, *supra*, pp. 6–8).

The thrust of petitioner's argument is that the statements, even if false, were not fraudulent because the government was not deceived, but conducted its independent investigation,[3] and because petitioner said that the claim was being turned over to the bonding company which eventually paid the claim. The false statements were made in an effort to resist a claim by the government which, under the true facts, could not be resisted. In the letter forming the basis of the first count, which alone would support the verdict, there is not even the promise on which petitioner relies, as to the claim being turned over to the bonding company. And in the others, petitioner was still resisting and attempting to get the government not to press the claim for reimbursement. The false statements were thus designed to deceive as to matters material to the government's claim. That the fraud was discovered and therefore ultimately unsuccessful in defeating the claim does not change the nature of petitioner's criminal purpose.

2. *Prior statements of witness Mishel.* Mishel testified that, about three years before trial, he gave to federal prosecutors a statement, running to about fifty pages, of all his activities in connection with stolen bonds (R. 197–203, 207). He testified that thereafter from time to time he made additional statements, usually oral (R. 207–208, 229–230). He said he had

[3] "Actually, the Treasury was, in due course, fully reimbursed * * *" (Pet. 16).

seen his master statement before trial, but no others (R. 230). He was asked whether at any time while he was in jail he urged a co-inmate Wissenfeld to give false testimony regarding a bond matter, and replied that he had no recollection (R. 242–243).

On October 22, 1956, petitioner asked for production of Mishel's statements, to be examined by the court under the then prevailing rule in the Second Circuit established by *United States* v. *Krulewitch*, 145 F. 2d 76 (R. 246). The court directed government attorneys to produce Mishel's statements in their possession (R. 246–247). On October 24, the court ruled (R. 369):

> The COURT. Before the jury comes back in, I had a chance to complete my work on the two statements that Mr. Hallinan had given to me.
>
> I am disposed to give one of them to the defendant. I am not going to give the defendant the master statement because I don't think there is any material inconsisteney that would be worthy of our attention and it does have many things in it that are unrelated to this case altogether.
>
> So I am going to mark the so-called master statement Court's Exhibit 3 and seal it. (Marked Court's Exhibit 3.)
>
> The COURT. The second statement is a statement of February 28, 1955, regarding this conversation with Wissenfeld which you cross-examined him on. I don't think it is material, but inasmuch as I don't see anything in here that could prejudice the Government for you to have, I would like for you to see the statement, and then if you want to ask for any re-

> lief on the basis of it we can't pass on it rather than my keeping it secret from you. * * *

The court asked defense counsel if he wanted to look at the document then or if they should proceed. Defense counsel stated he would have co-counsel look at it right away (R. 370). The following day, October 25, when court opened, the United States Attorney announced that he expected to put on two witnesses that morning and one in the afternoon and then rest (R. 429), which was just what he did (R. 430–477).

After argument on petitioner's motion for judgment of acquittal (R. 478–491) and a colloquy as to potential defense witnesses (R. 491–497), defense counsel asked what the court wished them to do about Mishel's statement of February 28, 1955 (R. 497). The court replied that it had given the statement to counsel for whatever relief counsel might request (R. 498). Defense counsel suggested that the statement could be offered in evidence or Mishel be recalled for cross-examination (R. 498). Counsel referred to language in the statement in which Mishel said he had bragged to Wissenfeld that the Miller case could not be tried without him and that he had the federal agencies in a position where he could embarrass them if they didn't aid him in an effort to have his state sentence reduced (R. 499). The court pointed out that the statement then went on to say that there was no such promise and that this was an attempt to impress jail acquaintances (R. 499). The court noted that Mishel on the stand had said he told a lot of untruths to his jailmates to impress them, and ruled that the

matter was not of sufficient materiality to bring Mishel back (R. 500). When counsel asked that they be given copies of a letter referred to in the statement and should not be penalized because the government had closed its case since Mishel was off the stand at the time, the court said (R. 502):

> But I don't see that that is crucial either. I think that the heart of the matter is that it isn't worth the time of the Court to go any further with respect to this letter because I think it is in substance and in weight exactly what he gave here on the stand. So, now, I will deny your applications on that.

(*a*) Petitioner's argument that these rulings constitute reversible error is unfounded. As the district court pointed out, the February 28 statement contained many things unrelated to the issues in the case, and there was no material inconsistency with Mishel's testimony on the stand (R. 369). Petitioner's counsel thought so little of its importance that they did not bring the matter up until after the motion for a judgment of acquittal had been argued. While the court did not rest its ruling on the fact that the government had rested its case, it is evident that the present claim that counsel was taken by surprise when the government rested its case is refuted by the record. Petitioner had the statement the day before and government counsel gave fair notice of the time when he expected to rest (R. 429). It was well within the area of the trial court's discretion to refuse to recall a witness, who had been thoroughly cross-examined, for further cross-examination on a matter as to which he had already testified.

(*b*) Under the rule of *Jencks* v. *United States,* 353 U. S. 657, and under present law, defense counsel would have been entitled, if he so requested, to examine those portions of Mishel's master statement which related to his testimony at the trial. The court below properly ruled, however, that the failure to turn over such statement did not constitute reversible error. Here, unlike *Jencks,* the court did look at the statement and found that it was consistent with Mishel's testimony. Petitioner was satisfied with the then prevailing rule in the Second Circuit. He had so little expectation that the Court of Appeals would find the statement inconsistent that he did not have it sent up to the Court of Appeals, although it had been sealed by the district court. By his own action he thus precluded any finding that he was prejudiced by not having the statement.

Mishel on the stand admitted numerous criminal activities, and, as noted above, admitted telling untruths in his boasting to fellow inmates. As to the matters crucial to this case, the cashing of the Chernoff bonds, it was the corroborating testimony of the three bank tellers and the exhibits (which in themselves would appear sufficient to establish the knowing falsity of petitioner's statements) that served to give credibility to Mishel's testimony. The error in failing to turn over relevant portions of the master statement was, therefore, in the circumstances, harmless. See Brief for the United States in Opposition, *Sheba Bracelets* v. *United States,* No. 556, this Term.

3. *Prior statement of witness Sershen.* Special Agent George J. Sershen was testifying on cross-ex-

amination about receiving a letter from the Treasury Department indicating that petitioner's bank was resisting the payment of the amount due on these bonds, whatever it was. Petitioner's counsel stated the amount (R. 475):

> Q. $6,684.50. A. I don't remember the amount, I don't remember the exact amount in the letter. At any rate, there was a request made in that letter for an additional report from me concerning the negotiation of the bonds and the part that Mishel and Mr. Miller played. And I submitted a report in answer to that letter. That may be the letter you are referring to, but I cannot remember the exact date.

This is the only reference in the record as to the possible existence of a report by Sershen other than the one the United States Attorney voluntarily gave the defense without request (R. 424–425). Such "additional report" was never mentioned again during the trial and no request was ever made for its production. The present contention that it was error not to order production of this further report, if such it was, is thus without merit.

4. *Cross-examination of petitioner.* Petitioner testified at length on direct examination as to his life history, his career in the banking business, and his civic activities (R. 583–593). He also testified that he had never heard the expression "stiff accounts" until the investigation of the bonds (R. 610).

On cross-examination he was asked if he had not heard the expression in 1931, when the State Banking Department compelled him to close several such ac-

counts. He replied that he did not recall, he would not say it had not happened (R. 667). He was asked several questions of similar nature and gave similar answers (R. 667–668).

Government counsel asked if petitioner remembered criticism by the former president of his bank for making loans to bookmakers, to which he answered he did not remember (R. 668). At this point petitioner's counsel objected to the entire line of testimony (R. 668). The court said he would overrule that objection, but would rule on objections to individual questions (R. 668–669). Government counsel then asked whether petitioner recalled any time when the president of the bank criticized him for allowing bookmakers to draw against uncollected funds. Objection was made, which the court sustained because of the word "criticizing", but said counsel could ask as to the conversation which took place. The following then took place:

> Mr. ROSENBLUM. My objection is based upon the fact that your Honor said in connection with the examination of witnesses you would limit it only to convictions.
>
> The COURT. No, as going to credibility, I let you go into matters going to credibility as to false testimony as to his prior convictions. You explored that fully.
>
> Mr. HALLINAN. I think I am proceeding on the theory with which your Honor is well familiar, 224 Fed. (2d), the *Pagano* case. On his direct examination there are about 20 pages in the record of his background at the bank.
>
> Mr. ROSENBLUM. Exception. [R. 669–670.]

Government counsel then proceeded to ask a series of questions as to petitioner's career in the banking business, as to kiting of checks, examination by the State Banking Department in 1931 as to allowing a certain individual to make book in a public telephone in the lobby of the bank, whether he allowed accounts in fictitious names, whether he had lent money in excess of the statutory amount, whether there was a full scale investigation by the banking department of his practice in that regard, whether he ever certified checks against uncollected funds, to all of which questions petitioner either answered in the negative or said that he did not recall (R. 670–672).

There is no merit in the contention (Pet. 32–39) that this was improper cross-examination. Petitioner was endeavoring to present himself to the jury, as he does in the statement of facts in this petition for a writ of certiorari, as a reputable banker to whom it would be incredible to impute the actions testified to by Mishel. It was relevant to bring out, by cross-examination, that the integrity of petitioner's banking operations had been questioned long before the matters to which these specific charges related. There is no suggestion that government counsel did not have reason to believe that the events asked about had happened and that truthful answers would have confirmed their existence. *United States* v. *Pagano*, 224 F. 2d 682, 686 (C. A. 2), certiorari denied, 350 U. S. 884, shows the propriety of such questions under the circumstances.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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